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No. 91-986

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1991

CRAIG L. SHERMAN, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

ROBERT V. ZENER
Attorney
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals correctly concluded that petitioner, a member of the Air Force whose active duty was extended during the Persian Gulf War, did not litigate in the district court the issue whether he had a reserve obligation remaining after expiration of the extension of his active duty.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. Doc. 2) is unreported. The opinion of the district court (Pet. App. Doc. 1) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. Doc. 3) was entered on August 20, 1991. The petition for a writ of certiorari was filed November 12, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On May 29, 1986, petitioner enlisted in the Air Force Reserve. Pet. 9. Upon enlisting, petitioner agreed to serve a total of eight years, at least four

years of which was to include active duty. Pet. App. Doc. 1, at 2. On November 28, 1986, petitioner enlisted for a four-year tour of active duty in the United States Air Force. *Ibid.* Shortly before November 27, 1990, when his active duty tour was scheduled to expire, events in the Persian Gulf intervened. A "Stop Loss" order was issued regarding petitioner's unit, which had the effect of suspending petitioner's separation date from active duty.[1] *Id.* at 2-5. Petitioner filed a request for a hardship waiver of the stop loss order, which was denied. Petitioner thereafter filed a petition for a writ of habeas corpus in the United States District Court for the Middle District of Georgia, the judicial district in which he was stationed.

2. The sole issue presented in petitioner's habeas corpus petition was the validity of the stop loss order respecting his unit. Petitioner made no allegation respecting whether he had a reserve obligation following his release from active duty. C.A. Record Excerpts Tab 2. The district court held that the stop loss order was valid, and accordingly denied the petition. Pet. App. Doc. 1, at 6-14.

During the trial in the district court, petitioner testified on direct examination that he understood the papers he signed when he entered on active duty to release him from his previously-assumed reserve commitment. Pet. 5-13. Government counsel declined to cross examine petitioner on the issue, stating that the testimony was "irrelevant to the proceedings." *Id.* at 12. In the portion of its opinion containing

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[1] By statute, the President has so-called "stop loss" authority, which entitles him to "suspend any provision of law relating to * * * separation applicable to any member of the armed forces who [he] determines is essential to the national security of the United States." 10 U.S.C. 673c(a).

factual findings, however, the district court stated that petitioner had "enlisted for an eight-year term in the Air Force Reserve and agreed to serve on active duty for not less than four years. This was later changed so that he was to serve four years' active duty only." Pet. App. Doc. 1, at 2. Aside from this isolated statement, the district court did not mention or analyze the extent of petitioner's reserve obligation at any other point in its 14 page opinion.

3. Shortly after petitioner took an appeal from the dismissal of his petition for habeas corpus, he was issued a Certificate of Release or Discharge from Active Duty, with an effective date of May 25, 1991. See Gov't C.A. Br. Addendum. Instead of a complete discharge, however, the Certificate transferred petitioner to the Air Force Reserve and provided that his "Reserve Obligation Termination Date" was May 28, 1994 (eight years after his original enlistment in the Air Force Reserve). *Ibid.*

4. In the court of appeals, petitioner argued that the district court erred in upholding the validity of the President's extension of his active duty. Petitioner also argued that he was released from the reserve obligation he had undertaken upon his original enlistment, Pet. 14-18, as a result of the district court's statement that, upon signing up for active duty, petitioner's total service obligation "changed so that he was to serve four years' active duty only." Pet. App. Doc. 1, at 2. Petitioner argued that he was accordingly entitled to an order discharging him from the Air Force Reserve.

The court of appeals affirmed the judgment of the district court in the following two-sentence order (Pet. App. Doc. 2, at 2):

> We find that the matters relating to appellant's discharge from the Air Force were not

litigated in the district court; therefore, we do not consider them here, on appeal. All other issues in this case are moot.

This petition for certiorari followed.

ARGUMENT

The court of appeals correctly determined that the issue of petitioner's reserve obligation following his release from active duty was not litigated in the district court, and thus could not be raised on appeal. The only issue that could be raised on appeal—the validity of the stop loss extension of petitioner's active duty—became moot when the Gulf War ended and petitioner was released from active duty while his appeal was pending, and petitioner does not contend otherwise.

While the petition for a writ of habeas corpus (C.A. Record Excerpts Tab 2) asked the court to discharge petitioner "from the United States Air Force" (*id.* at 3), the body of the petition was addressed exclusively to the stop loss issue. Petitioner did not even raise the issue whether his active duty contract released him from his previously-agreed upon reserve obligation. Nothing in the district court's legal discussion (Pet. App. Doc. 1, at 6-13) purports to discuss the issue of petitioner's reserve obligation, the resolution of which would depend upon an analysis of the enlistment documents as well as the governing statute and regulations regarding petitioner's length of service obligation.[2]

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[2] We note that Congress by statute has precluded the Air Force from releasing petitioner from his reserve obligation except on the ground of personal hardship. 10 U.S.C. 651(a) provides:

> Each person who becomes a member of an armed force [subject to an exception for ROTC members] shall serve

Petitioner argues (Pet. 17-18), however, that the district court's offhand statement of fact regarding petitioner's service obligation—which, as the government stated at trial, was irrelevant to the issues in the case—constituted an adjudication of the point. To the contrary, as the court of appeals' decision makes clear, the issue was neither raised nor decided in the district court. The government argued in the court of appeals (Gov't C.A. Br. 12-13) that petitioner's testimony was not sufficient to raise the issue; and, in refusing to pass on the issue, the court of appeals agreed. We fail to see how the court of appeals could have concluded otherwise, in light of the issue's irrelevance to petitioner's claim, the lack of briefing or argument in the district court on the point, and the district court's failure to analyze the issue.

Nor is petitioner correct that the district court's judgment precludes him from litigating the extent of his reserve obligation in another suit. There could be no serious argument that either claim or issue preclusion attached to the district court's isolated

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> in the armed forces for a total initial period of not less than six years nor more than eight years, as provided in regulations prescribed by the Secretary of Defense * * * unless such person is sooner discharged under such regulations because of personal hardship. Any part of such service that is not active duty or that is active duty for training shall be performed in a reserve component.

A Defense Department Directive (DoD Directive 1304.25 (Mar. 17, 1986)), and an Air Force regulation, AFR 35-41, provide that for persons enlisting on or after June 1, 1984, the military service obligation is eight years and that any portion not served on active duty shall be performed in a Reserve component. Petitioner does not suggest, and there is no basis for suggesting, that he was discharged from his reserve obligation on the ground of personal hardship.

statement on an issue that was neither actually litigated, nor necessary—or even related—to the claim that the district court did decide.[3] Even if such a baseless argument were made in a subsequent case, the court of appeals' decision here, which expressly states that the issue was not litigated in the district court, would pose an insurmountable barrier—if, indeed, it would not itself be preclusive on the issue of preclusion.

Finally, apart from the fact that petitioner's argument is wrong on the merits, this case does not present any issue of general importance warranting this Court's review.

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[3] The issue of petitioner's reserve obligation was neither "actually litigated" in the district court, nor was it "a critical and necessary part of [that court's] judgment." *Greenblatt* v. *Drexel Burnham Lambert, Inc.*, 763 F.2d 1352, 1360 (11th Cir. 1985). The district court's statement relating to that issue is therefore not entitled to preclusive effect. See, *e.g.*, *In re Miera*, 926 F.2d 741, 743 (8th Cir. 1991); *Peck* v. *Commissioner of Internal Revenue*, 904 F.2d 525, 527 (9th Cir. 1990); *Greenblatt* v. *Drexel Burnham Lambert, Inc.*, 763 F.2d at 1360; *DeWeese* v. *Town of Palm Beach*, 688 F.2d 731, 733 (11th Cir. 1982).

As to claim preclusion, we do not believe that the issue of petitioner's reserve obligation was a necessary part of his "claim" relating to the extension of his active duty. He therefore should not be barred from litigating that separate claim in a subsequent case. See, *e.g.*, *Lubrizol Corp.* v. *Exxon Corp.*, 929 F.2d 960, 963 (3d Cir. 1991); *Aliff* v. *Joy Mfg. Co.*, 914 F.2d 39, 42-43 (4th Cir. 1990); *Barnett* v. *Stern*, 909 F.2d 973, 977-978 (7th Cir. 1990); *In re Howe*, 913 F.2d 1138, 1143-1144 (5th Cir. 1990); see also Restatement (Second) of Judgments § 24(1) (1982). The factual and legal bases for the claim that petitioner did pursue (alleging the invalidity of the stop loss order extending his active duty) were distinct from any possible basis for the claim that he did not pursue (that he was released from his reserve obligation when he signed up for active duty).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

ROBERT V. ZENER
Attorney

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